

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10539 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements? -
2. To be referred to the Reporter or not? - :
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? -
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? -
5. Whether it is to be circulated to the Civil Judge? : NO
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DHUDA HANJA SON OF DECEASED HANJA NARA

Versus

PATEL SURYAKANT JASBHAI

Appearance:

MR DK ACHARYA for Petitioner

MR AJ PATEL for Respondent No. 1

NOTICE SERVED for Respondent No. 3

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision:29/12/1999

ORAL JUDGEMENT

This petition has been filed against the judgment and order dated 22-5-1995 passed by the Secretary (Appeals), Revenue Department, Government of Gujarat, Ahmedabad in Revision Application No. SRD/JMN/BNS/96/93.

2. The land bearing survey no. 98 admeasuring 12 Acre - 4 Gunthas situated in the sim of village Rinchhadi Tal. Danta was running in the name of Haja Nara. After his death the land was running in the name of his legal heir namely Bai Dharmi daughter of Haja Nara being minor through her guardian Nathiben Hajabhai and Dudha Haja vide entry No. 115 by way of succession. By a conditional sale deed dated 10-11-1971 Rathod Haja Nara's heirs namely Nathiben widow of Haja Nara and Dudha Haja mortgaged the property in dispute for Rs. 1,500/- in favour of Patel Suryakant and Shankerlal with a condition that the land in dispute will be given back after 15 years within two years thereafter. Some question was raised in the State Assembly and thereupon the Collector by the letter dated 30-4-1986 directed the Dy. Collector to hold an inquiry and accordingly the inquiry was held by the Dy. Collector vide Land Case No.416/86 and held by the order dated 16-9-86 that the provisions of Section 73AA of the Bombay Land Revenue Code (hereinafter referred to as the Revenue Code) came into operation only on 1-1-1981, hence they were not applicable Regular Civil Suit No. 179/86 was filed by the mortgagee for injunction in the Court of Civil Judge (SD), Palanpur restraining the defendants wherein Dudha Haja was not impleaded as a party. The petitioner moved an application on 10-10-86 for keeping the deposit of Rs.3,000/- for redemption of the mortgaged property. Dudha Haja filed an appeal against the order of the Dy. Collector before the Collector. By the order dated 17-4-1987 the Collector returned that appeal to the petitioner with a liberty to file an appeal before the Secretary, (Appeals), Revenue Department. The Revision Application was filed before the Secretary (Appeal) Revenue Department. But the Dy. Secretary also returned that Revision Application by the order dated 15-4-1987 informing him that the Collector was the competent to hear the matter and the matter should be presented before the Collector concerned. Hence, the petitioner filed again that appeal before the Collector. Before pronouncement of the order of the Collector, one of the mortgagees Patel Shankerlal died on 16-12-1989. The Collector in the appeal filed by the petitioner remanded the case back to the Deputy Collector to hold inquiry and take decision afresh by the order dated 31-12-1989. The Deputy Collector by the order dated 29-8-92 held that the sale has been made after 1-2-1981 without previous

permission of the competent authority i.e. the Collector u/s 73AA of the Revenue Code. Hence, that amounts to breach of the provisions of Section 73AA of the Revenue Code and the Mamlatdar was directed to take necessary action for restoration of the land to the original owner. No appeal was filed by the respondents before the Collector against that order. However, it appears from the judgment that the appeal was preferred by the respondents before the Collector, Banaskantha which was returned to the respondent for presenting the Revision Application before the Secretary (Appeals) Revenue Department by the order dated 12-10-1993. Hence, the respondents filed Revision Application before the Secretary (Appeals), Revenue Department on 29-10-1993. After considering the materials on record, the Secretary (Appeals), Revenue Department allowed the Revision Application and set aside the order dated 31-12-1989 passed by the Collector and also the order dated 29-8-1992 in Remand Case vide the impugned order dated 23-5-1995. The Secretary (Appeals) Revenue Department, came to a conclusion that the names of Dharmiben d/o Haja Nara and Dudha Haja were running in the revenue record and he also relied on the findings recorded by the Dy. Collector in the order dated 5-11-73 wherein it was held by the Dy. Collector that the name of Dudha Haja was entered in the entry No. 115. The system of ascertaining the heirs on the strength of the entry was not legal one. The Civil Court has to decide the rights of the heirs in the property in dispute. Dudha Haja has not acquired any legal right in the land in dispute. The land in dispute was sold to the occupants and hence Dudha Haja has not acquired any legal right in the disputed land. It is also held by the Secretary (Appeals), Revenue Department that the the disputed land has already been sold by the conditional registered sale deed dated 10-11-1971 to them and it reveals from the said document that the possession of the land was handed over to the respondents in the year 1971 and entry No. 122 was made on the basis of the registered document. The Dy. Collector, Palanpur issued a show cause notice on 21-6-73 in respect of the entry No. 122 in the revenue record. That entry was confirmed and the proceedings and process of the revision application was closed and the order dated 5-11-1973 was passed discharging the notice. Thus, the land in dispute was in possession of the respondents since 1971. It is also considered and held by the Secretary (Appeals), Revenue Department that Nathiben on 18-6-1986 has executed the document waiving her right to take back the land in dispute which was given by the registered document of the year 1971 and that document executed by Nathiben on 18-6-1986 is a deed of

renunciation. The Secretary (Appeals), Revenue Department also considered and based his judgment and order on the aspect that the Dy. Collector passed the order in the capacity of the Collector. Hence, the Revision Application heard and decided by the Collector was also beyond his jurisdiction. thus, the order passed by the Collector on 31-12-1989 remanding the matter back to the Dy. Collector is without his jurisdiction and on the basis of the order of the Collector, the order of the Dy. Collector has been passed which is also null and void. During pendency of the appeal before the Collector Shankerlal Patel one of the mortgagees expired on 16-12-1989. When the order was passed by the Collector on 31-12-1989 against the dead person, that order is liable to be quashed and set aside. The Dy. Collector also passed the impugned order in the name of Shankerlal Patel who was dead person and hence the same is liable to be set aside and quashed. It was also considered by the Secretary (Appeals), Revenue Department, that change of possession was made on the basis of the conditional sale document in the year 1971 and the entry no. 122 was made on the basis of that conditional sale deed. It was also reviewed by the authority and confirmed it on 5-12-1973. The provisions of Section 73AA of the Revenue Code came into operation on 1-1-1981. As the land has already been transferred before 10 years, before the provisions of Section 73AA of the Revenue Code were made applicable, the entry No. 122 was granted and was confirmed in the review proceedings. Thus, the fact was considered by Secretary (Appeals), Revenue Department that the Dy. Collector passed the order on the basis of the deed of renunciation dated 18-6-1986 which was made after 1-2-1981 and the provisions of Section 73AA of the Revenue Code came into operation later on. But the transfer of the land was made in favour of the respondents by the registered document in the year 1971. At that time, there was no provision like the provisions of Section 73AA of the Revenue Code and therefore the order of the Collector was without jurisdiction.

3. Thus, the order of the Secretary (Appeals), Revenue Department has been challenged by the learned counsel for the petitioner on the ground that renunciation deed executed by Nathiben as widow of Haja Nara cannot be accepted in the evidence and the same is illegal and illegally based thereupon as Nathiben has already remarried about 10 years prior to execution of the renunciation deed. After remarriage Nathiben has lost all her rights in the family of her previous husband. Hence, the conditional sale with possession is nothing but it is a mortgage deed which was executed by

Nathiben in favour of the respondents no. 1 and 2. As it was a conditional sale deed tenancy rights are not permitted u/s 63 of the Tenancy Act. The deed of renunciation executed by Nathiben can not be registered unless prior approval of the Collector is obtained, as if transfer rights of ownership from one person to another and its registration is must. In the present case, before execution of the renunciation deed by Nathiben, prior permission of the Collector was not obtained. Hence, the deed of renunciation executed by Nathiben is inadmissible in the evidence under the law. The order dated 29-8-1992 passed by the Dy. Collector in favour of the petitioner is final one as no appeal was filed by the respondents. Without exhausting the remedy of appeal the revision application filed by the respondents before the Tribunal directly is illegal and incompetent. The order of the Collector remanding back the matter to the Collector for taking decision afresh has not been challenged in the Revision Application before the Secretary, (Appeals), Revenue Department. Though the Dy. Collector was made a party but the Collector was not impleaded as party in the revision application. Thus, even the order of the Collector is nullity and without jurisdiction and if the same has not been challenged before the appropriate forum it will be deemed to be final one and cannot be said nullity or without jurisdiction.

4. On the contrary, learned counsel for the respondents argued that the Collector's order remanding the case back to the Collector is illegal and nullity and without jurisdiction as the Dy. Collector had exercised the power of the Collector. The order of the Collector was passed on 31-12-1989 though Shankerlal Patel one of the mortgagees died on 16-12-1989 and without bringing his legal heirs on record the order passed against the dead person Shankerlal is illegal and not sustainable in the eye of law. The land in question was transferred in the year 1971. But the process for redemption of the mortgage/conditional sale was started in the year 1986. Hence, it is barred by limitation. Nathiben has produced the affidavit before the Court concerned relinquishing her right in favour of the respondents and the land in question was transferred in 1971. While the Collector wrongly considered renunciation deed which was executed in the year 1986 and has also wrongly presumed that the transfer of the land was made in the year 1986. As such, the provisions of Section 73AA of the Revenue Code were not attracted as the transfer has already been made in the year 1971.

5. I have considered the rival contentions made by the learned counsel for the parties. Initially, the Dy. Collector by the order dated 16-9-1986 held that the provision of Section 73AA of the Revenue Code are not attracted to the present case. Against that order, the appeal was preferred by the petitioner before the Collector. But the Collector returned that appeal with a liberty to file it before the Secretary (Appeals), Revenue Department. Therefore, the Appeal/Revision Application was filed before the Secretary (Appeals), Revenue Department and the Deputy Secretary, Revenue Department returned that revision application to the petitioner informing him that the Collector was only competent authority to hear and decide the case against the order of the Dy. Collector and it should be presented before the Collector. Thereafter, the appeal was filed before the Collector and the Collector decided the appeal and remanded the case back to the Dy. Collector directing the Dy. Collector to make inquiry and take decision afresh by the order dated 31-12-1989. As such, once the Collector was authorized by the higher authority to hear the appeal against the order of the Dy. Collector, even it is presumed that the directions of the Secretary, Revenue Secretary were illegal at this stage the exercise of power pursuant to authorization by the Secretary cannot be said to be illegal or incompetent. Thus, the order of the Collector on the basis of the authority conferred by the Secretary, Revenue Department cannot be said illegal at all. The Secretary, Revenue Department by the impugned order has committed manifest error on the face of the record and erroneously held that the Collector was incompetent to hear appeal against the order of the Dy. Collector. Thus, the Collector was fully justified in hearing the appeal and in deciding and remanding the matter back to the Dy. Collector. The Secretary, Revenue Department, further committed error in holding that if the order of the Collector was illegal, then the order of the Dy. Collector was also illegal and not sustainable in the eye of law. That view taken by the Dy. Secretary is obviously illegal and not sustainable in the eye of law. Secondly, when the respondents filed appeal before the Collector against the order of the Dy. Collector it was returned to the respondents by the office of the Collector by the letter dated 12-10-1993, then it was filed as revision application before the Secretary, Revenue Department and it was entertained and it was not returned to present the appeal before the higher authority i.e. Collector. Thirdly, the order of the Collector has not been challenged in the memo of the Revision which was filed before the Secretary, Revenue Department. Thus, the

decision on this point is a manifest error on the face of the record committed by the Secretary, Revenue Department.

6. The Secretary, Revenue Department, has further committed an error in holding that name of Dudha Haja entered in the revenue record vide entry No. 115. The system of ascertaining heirs on the strength of the entry in the revenue record was not legal one. Once the heir is ascertained the claim of the heirship over the property could have been decided only by the Civil Court. It is erroneously held that the findings recorded at the initial stage by the Dy. Collector were justified that Dudha Haja has not acquired any legal right in the land in dispute. Dudha Haha is the son of the deceased owner Haja Nara and that has not been challenged by any of the respondents at any stage before any authority. If the entry has been made in the revenue record and unless that heirship is not disputed he is not required to get his right of heirship decided by the Civil Court. The Secretary, Revenue Department has also committed an error that the conditional sale deed registered on 10-11-1971 shows that the possession of the disputed land was handed over to the respondents in the year 1971 and the entry no. 115 was recorded in the revenue record and in the review that entry no. 115 was maintained. Thus, the land in dispute was in possession of the respondents since 1971. For determination of the ownership or title over the property possession is not a sole criteria and certain other things are also necessary and required to be considered. If any person is in the possession in the capacity of tenant or lessee or mortgagee or otherwise, it does not mean that the person in possession of the property is deemed to be an owner or having title over that property. Therefore, so far as the deed of renunciation is concerned, an affidavit filed before some Court is useless and irrelevant and is not admissible in the evidence under the law unless it is proved that when the renunciation deed was executed Nathiben was legally entitled to execute the said deed of renunciation. As Nathiben has remarried 10 years prior to execution of renunciation deed, she has lost all her rights in the property of the family of her previous husband and hence she was not entitled to execute the deed of renunciation or to file any affidavit in that respect. The Secretary, Revenue Department has committed manifest error on the face of the record to consider and rely upon such the documents which is irrelevant to be considered as an evidence admissible in the eye of law.

7. The contention of the learned counsel for the

petitioner that the conditional sale is nothing but a mortgage under Section 58 (c) of the Transfer of Properties Act and that right was to hold the property as not an owner or tenant but as a mortgagee has substance. The deed of renunciation has been executed in the year 1986 by Nathiben and that deed will be deemed to be a deed of conveyance and will alone can be treated as deed of transfer of right which finds support from the decision of the Allahabad High Court in the case of Harish Chandra Vs. Chandra Shekhar and Others, reported in AIR 1977 Allahabad, 44, wherein it has sustained the view that the relinquish of right will be deemed to be transferred of ownership or title as such in the present case in the year 1971 the possession was transferred on the basis of the mortgage. Transfer of tenancy right or ownership was made in the year 1986 and right of tenancy or ownership was not transferred which could be transferred on the basis of the deed of renunciation if considered as admissible but if it is not admissible the right of tenancy (title) or ownership would remain with mortgagor and it can also be considered that transfer of the property in the year 1986 could only give right of ownership or tenancy. But at that time, the provisions of Section 73AA of the Revenue Code have already come into operation. Hence, the provisions of Section 73AA of the Revenue Code would be attracted and the transfer of ownership or tenancy in the year 1986 would be illegal as that transfer of ownership or tenancy requires prior approval of the Collector and admittedly no prior permission or approval of the Collector was obtained for transfer of ownership or right of the renunciation by Nathiben.

8. In view of the provision of Section 58 (c) of the Transfer of Properties Act as soon as the payment of sale price is made the sale becomes illegal. Mortgager is concerned with only the mortgage money. That could have been made made by any of the mortgagors. When the petitioner made an attempt to make payment to the respondents they refused to accept and he has to deposit that amount in the Court and that amount is still lying in the Court. As such the mortgage was redeemed and the petitioner became owner or tenant of the property in dispute. No interest is remained with the respondents in respect of the property in dispute.

9. The Secretary (Appeals), Revenue Department has based his findings on the revenue entry showing the possession of the respondents on the land in dispute but he failed to ignore the well settled legal position that the revenue entries do not confer any right, title or

interest except the person whose name is running in the revenue entry is responsible for the payment of land revenue or rent of the land. It is not in dispute that the petitioner and his mother executed conditional sale and transferred the possession but the ownership or tenancy rights were not transferred. The respondents are neither tenant u/s 4 (c) of the Bombay Tenancy and Agricultural Lands Act, 1948 nor u/s 3 (16) of the Bombay Land Revenue Code. As such, on the basis of the entries the respondents can not become owner or tenant of the land in dispute. On this legal aspect the order of the Secretary, Revenue Department, is erroneous and not sustainable in the eye of law.

10. The respondents including the heirs of one of the deceased respondents have an opportunity before the Secretary (Appeals), Revenue Department to place their case. Even before this Court the case was argued at length on behalf of the respondents including the heirs of the respondents. The provisions of Civil Procedure Code are not applicable in strict sense regarding the abatement of proceedings on the death of one of the parties. As such the order passed by the Collector remanding the case back to the Dy. Collector for decision afresh and the order of the Dy. Collector holding that the provisions of Section 73AA of the Bombay Land Revenue Code are applicable to the present case and renunciation of rights in the year 1986 would amount to transfer of ownership and tenancy are fully justified and are affirmed and the order of the Secretary (Appeals), Revenue Department - respondent is liable to be quashed and set aside.

11. Accordingly, the petition is allowed and the impugned judgment and order dated 22-5-1995 of the Secretary (Appeals) Revenue Department in Revision Application No. SRD/JMN/BNS/96/93, is quashed and set aside. Notice is discharged, with no order as to costs. Interim relief, if any, stands vacated.

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/JVSatwara/